

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO. 9141 OF 2004

Office Notes, Office Court's or Judge's orders
Memoranda of Coram,
appearances, Court's
orders or directions
and Registrar's orders

Mr. Uday Warunjikar i/b Mr. Shrishail
Sakhare for the petitioner.

Mr. K.Y. Mandlik for respondents.

CORAM : ANOOP V. MOHTA, J.

DATE : 05.12.2005

. By the present writ petition, a challenge is made to the order dated 4/10/2004, whereby, an application filed to appoint a Court Commissioner was rejected. The basic reason appears to be, the Supreme Court judgment in M/s Filmistan (Pvt.) Ltd. Bombay V/s Bhagwandas Santprakash and another, (AIR 1971 SC 61) whereby, it is observed that the appointment of Commissioner is a

discretionary power and it should not be used in each and every case. The inability to attend the Court for various reasons including being a head of Math and also Sanyasini, though may not be the basic foundation for appointment of the Commissioner but are as an additional facet to consider, such application for appointment of commissioner cannot be overlooked. Without going into the controversy about the provisions of exemption, as contemplated under section 135 of Civil Procedure Code (C.P.C.). In the present case, admittedly, an application was filed for appointment of Court Commissioner and not an application for exemption.

2. The learned Counsel appearing for the petitioner has also pointed out an earlier order, dated 2/4/1996, whereby the Court has granted an application to appoint Commissioner for examination of plaintiff alongwith the witnesses,

referred therein. The said order remained intact. However, by an order dated 5th October, 2001, the High Court in appeal against the order directed to expedite the suit, preferably within six months from the receipt of the order. Now, the suit is pending and is ready for evidence.

. Now considering the Supreme Court's view, in (Salem Advocate Bar Association, Tamil Nadu V. Union of India) (2005 (6) SCALE 26) based on the amended provisions of C.P.C.as referred there is no doubt that it is necessary for the parties to move and see that the trial should proceed fast, by invoking the ways and means available under the C.P.C. Act. The appointment of a Commissioner definitely, one of the facet, which cannot be overlooked which is necessary to move the proceeding further. In the present case, considering the facts and circumstances,

there is no harm, if based on averments made, a request for appointment of Commissioner to record her evidence, if considered. Whether these averments are correct or not is also irrelevant at this stage to decide, basically in view of the fact, that admittedly, she is a head of Math and also Sanyasini. In this view of the matter, I am inclined to consider her application for appointment of Commissioner to record her evidence. In the result application Exh.114 is allowed.

3. Considering the present scheme, it is expected that the Court will appoint the Court commissioner, as early as, possible and to proceed expeditiously. This writ petition is therefore, allowed in terms of prayer clause (C). No order as to cost.

(ANOOP V.MOHTA, J.)